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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Sean B. Runningeagle,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.
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No. CV-98-1903-PHX-PGR

ORDER

15 On July 18, 2012, the Ninth Circuit ordered this Court to reconsider, in light of
16 *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), its procedural default rulings on a number of
17 claims alleging ineffective assistance of counsel at trial and sentencing. (Doc. 139.) The
18 Ninth Circuit directed the Court to (1) determine “whether the ineffective assistance of
19 counsel claims that it previously found procedurally defaulted fall within *Martinez*”; (2)
20 if so, address those claims on the merits; and (3) afford Petitioner an evidentiary hearing
21 “if it determines one is warranted.” (*Id.*)
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24 This Court ordered the parties to brief the *Martinez* issue—that is, whether
25 Petitioner’s default of the claims can be excused by the ineffective performance of post-
26 conviction counsel—and the merits of the defaulted claims. (Doc. 140.) The Court also
27 ordered Petitioner to set forth any requests for evidentiary development. (*Id.*)
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1 Petitioner's car. Tilden and Petitioner also stole a floor jack and tool box. Orva took a
2 bicycle from the open garage.
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4 Mr. and Mrs. Williams, an elderly couple, lived next door to the Davises. Mr.
5 Williams came out of his house and told the young men to leave or he would call the
6 police. Orva returned to the car, but Petitioner and Tilden approached Mr. Williams.
7 Petitioner concealed his knife by his side. Tilden carried a large flashlight.
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9 Petitioner began to tease and frighten Mr. Williams with the knife. Mr. Williams
10 retreated and told Petitioner to put the knife away. Mrs. Williams then came out of the
11 house and yelled at them. Tilden confronted Mrs. Williams, argued with her, and hit her
12 on the side of the head with the flashlight. Mr. Williams told them to leave his wife alone,
13 and helped her back into the house. Petitioner broke through the Williams' door with a
14 tire iron, and he and Tilden barged in.
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17 The noise awakened a neighbor, who heard Mrs. Williams crying and the words
18 "bring him in" spoken by a tall, young man he saw standing in the Williams carport. The
19 neighbor called 911, but by the time the police arrived, Mr. and Mrs. Williams were dead.
20 Mr. Williams suffered several head injuries and five stab wounds, three of which were
21 fatal. Mrs. Williams also suffered several head injuries, one of which fractured her skull
22 and was possibly fatal, in addition to four stab wounds, three of which were fatal.
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25 The police searched the Williams home. The drawer in which Mrs. Williams
26 stored her jewelry was open and some jewelry was missing. They found an empty purse,
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1 blood drops and two bloody shoe print patterns. They discovered Petitioner's palm print
2 on the clothes dryer next to the bodies.
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4 Petitioner discussed the crimes on several occasions before his arrest. He told his
5 girlfriend that he had been in a fight with two people and had hit them "full-force." He
6 showed her his car trunk full of the stolen property. He showed the hood scoop and
7 carburetors to another friend.
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9 When the defendants were arrested, the police found, among other things, the
10 Davis air scoop with Petitioner's prints on it, two carburetors, the tool box, Mrs.
11 Williams' wallet and college pin, a large black flashlight with Tilden's prints on it, and
12 the Davis bicycle with Petitioner's prints on the wheel rim. A Phoenix Police Department
13 criminalist matched Petitioner's shoes with the bloody shoe prints found at the Williams
14 house, and also found that an inked print of Tilden's shoes made a pattern similar to other
15 shoe prints at the house.
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18 Petitioner, Tilden, and Orva Antone were indicted on two counts of first-degree
19 murder, and various burglary counts. Antone pleaded guilty to burglary and testified for
20 the state at the joint trial.
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22 On July 27, 1988, a jury convicted Petitioner of two counts of first-degree murder,
23 two counts of theft, and one count each of first-degree burglary, second-degree burglary,
24 and third-degree burglary. (ROA 51; ME 7/27/88). On February 3, 1989, the trial court
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1 sentenced Petitioner to death on the murder convictions.² (ROA 290.) That same day,
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3 Petitioner filed a Notice of Appeal with the Arizona Supreme Court.

4 On October 26, 1989, while his direct appeal was pending, Petitioner filed a *pro se*
5 petition for post-conviction relief (PCR) pursuant to Rule 32 of the Arizona Rules of
6 Criminal Procedure, alleging, among other claims, ineffective assistance of counsel.
7 (Doc. 21, Ex. B.) The trial court appointed attorney George Sterling as counsel.³ (ME
8 11/12/89.) Sterling moved to withdraw based on Petitioner's allegation of a conflict of
9 interest. (ROA 305.) Petitioner filed a *pro se* supplement to his PCR petition on
10 December 7, 1989, alleging "ineffective/inefficient and incompetent legal counsel."
11 (Doc. 21, Ex. C; ROA 306.) On March 21, 1990, the trial court appointed attorney John
12 Antieau to replace Sterling. (ME 3/21/90.)

13 On March 27, 1990, Antieau, noting that the appellate record was not yet
14 complete, moved for a 60-day extension of the deadline for filing supplemental
15 pleadings. (ROA 309.) He filed another request, on April 29, 1990, which the court
16 granted. (Docs. 311, 313.)

17 On May 8, 1990, the Arizona Supreme Court stayed the appeal and re-vested
18 jurisdiction in the trial court to resolve the merits of the PCR petition. (Ariz.Sup.Ct.R.
19 19.)

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25 ² Co-defendant Tilden was also convicted on various counts, including two counts
26 of first-degree murder, but received life sentences on the murder convictions.
27 *Runnigeagle*, 176 Ariz. 59, 61, 859 P.2d 169, 171.

28 ³ The Honorable Gloria Ybarra, of the Maricopa County Superior Court, presided
over the trial and the first round of PCR proceedings.

1 On June 18, 1990, Antieau filed a motion seeking another 60-day extension, to
2 allow him “sufficient time to complete his review of the trial record.” (ROA 322.) The
3 court granted the motion. (ROA 327.)

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5 On November 20, 1990, after several additional deadline extensions (*see* ROA
6 331, 334, 337), Antieau filed a second supplemental petition. (ROA 339.) Antieau raised
7 two claims of ineffective assistance of trial counsel: that counsel performed ineffectively
8 by failing to move to sever Petitioner’s trial from codefendant Tilden’s and that counsel
9 performed ineffectively during closing argument. (*Id.*) On April 19, 1991, the state trial
10 court denied post-conviction relief, finding, with respect to the ineffective assistance
11 claims, that Petitioner had not “presented material issues of fact and a ‘colorable claim.’”
12 (Doc. 21, Ex. F at 2; ROA 349.) The court also noted that the issue of severance was
13 before the Arizona Supreme Court on direct appeal. (*Id.*)

14
15 Antieau then filed a motion for rehearing, which was also denied. (*Id.*, Ex’s. G, H.;
16 ROA 352, 355.) On July 15, 1991, Antieau filed a petition for review. (ROA 356.) The
17 Arizona Supreme Court accepted review and consolidated Petitioner’s PCR claims with
18 his direct appeals claims. Antieau filed his opening appellate brief on August 29, 1991,
19 again raising the two claims of ineffective assistance of counsel. (Doc. 21, Ex. A.)

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21 On April 20, 1993, the Arizona Supreme Court issued its opinion affirming
22 Petitioner’s convictions and sentences and denying post-conviction relief. *Runningeagle*,
23 176 Ariz. 59, 859 P.2d 169. The court rejected Petitioner’s claims of ineffective
24 assistance of trial counsel. *Id.* at 63, 859 P.2d at 173.

1 Antieau did not represent Petitioner in the second PCR proceeding. The trial court
2 originally appointed attorney Jess Lorona. (Doc. 21, Ex. I.) After the notice of post-
3 conviction relief was properly issued, however, Petitioner filed a written motion to
4 represent himself, which the trial court granted. (*Id.*, Ex's. Q, R.) Petitioner then wanted a
5 Texas attorney to represent him. (*Id.*, Ex. S.) After the trial court denied the request,
6 Petitioner filed a letter requesting to be allowed to proceed *pro per*. (*Id.*, Ex's. T, U.)
7 Petitioner failed to timely file a PCR petition, and the trial court granted the State's
8 motion to dismiss. (*Id.*, Ex's. T, V (Exhibit A), W.)

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12 Petitioner later initiated a third PCR proceeding. Counsel Dennis Jones filed a
13 220-page PCR petition. (*Id.*, Ex. X.) The petition raised claims of ineffective assistance
14 of counsel at trial and sentencing. (*Id.* at 23–30, 75–80, 97–142). It also alleged that
15 Antieau was ineffective on appeal and in the first PCR proceeding. (*Id.* at 195–96.) The
16 state trial court denied the petition.⁴ (*Id.*, Ex. Y.) It found the ineffective assistance claims
17 to be procedurally defaulted pursuant to Rule 32.2(a)(3) of Arizona Rules of Criminal
18 Procedure because they had not been previously raised. (*Id.*) The court alternatively
19 found that the claims were not colorable. (*Id.*) The Arizona Supreme Court denied a
20 petition for review. (*Id.*, Ex's. BB, at 3; CC.)

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24 Petitioner filed his amended federal habeas petition on April 15, 1999. (Doc. 1.)
25 The parties first addressed whether the asserted claims were procedurally defaulted. On
26 February 6, 2004, this Court entered an order deciding the procedural status of

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28 ⁴ The Honorable David R. Cole presided over the third round of PCR proceedings.

1 Petitioner's guilt-phase claims. (Doc. 90.) Among the claims found procedurally
2 defaulted were three of the claims now at issue: 1-C (alleging that trial counsel was
3 ineffective in not requesting second counsel), 1-H (ineffective assistance in not blaming
4 Tilden for the murders), and 15 (alleging that Antieau was ineffective on appeal and in
5 the first PCR proceeding). (*Id.*)
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8 On March 10, 2006, this Court filed an order deciding the procedural status of
9 Petitioner's sentencing-phase claims. (Doc. 108.) Among the claims found procedurally
10 defaulted were Claims 17-A (ineffective assistance in not developing and presenting
11 mitigation) and 17-D (ineffective assistance in not obtaining an independent expert for
12 sentencing). (*Id.*)
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14 After the parties briefed the merits of the non-defaulted claims and Petitioner's
15 requests for evidentiary development, the Court issued its memorandum decision and
16 order on November 27, 2007, denying relief and dismissing the habeas petition. (Doc.
17 132.) It also denied Petitioner's requests for evidentiary development. (*Id.* at 1, 37–44.)
18 Finally, the Court ruled that Petitioner was not entitled to a certificate of appealability
19 (COA) on any claim. (*Id.* at 44.)
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22 The Ninth Circuit granted a COA on five claims: Claims 1-D, 2, 6, 15, and 19.
23 (Ninth Circuit Docket, 15.) Petitioner chose not to present Claim 15 in his opening brief
24 on appeal, but did raise the other four certified claims. (*Id.* at 25.) The Ninth Circuit panel
25 heard oral argument on February 10, 2011. (*Id.* at 45.)
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1 The panel issued its opinion on July 18, 2012. The majority opinion considered the
 2 four claims that Petitioner raised on appeal, found them meritless, and affirmed this
 3 Court's judgment denying habeas relief. *Runningeagle v. Ryan*, 686 F.3d 758, 763 (9th
 4 Cir. 2012).

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 6 In a separate order issued the same day, the panel, with one dissent, granted
 7 Petitioner's motion for a "limited remand" pursuant to *Martinez*.⁵ (Ninth Circuit Docket,
 8 59.) The order specified 12 claims that this Court had found procedurally defaulted. (*Id.*)

9 DISCUSSION

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 11 Petitioner contends that Antieau performed ineffectively during the first PCR
 12 proceedings by failing to raise certain claims that trial counsel performed ineffectively
 13 during the guilt and sentencing phases of Petitioner's trial. Petitioner argues that under
 14 *Martinez* Antieau's ineffective performance establishes cause and prejudice for the
 15 default of Claims 1-D, 1-H, and 17.

16 **I. APPLICABLE LAW**

17 **A. Ineffective Assistance of Counsel**

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 19 Claims of ineffective assistance of counsel are governed by the principles set forth
 20 in *Strickland v. Washington*, 466 U.S. 668 674 (1984). To prevail under *Strickland*, a
 21 petitioner must show that counsel's representation fell below an objective standard of
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 26 ⁵ Judge Bea, in dissent, wrote that, "The claims at issue were not appealed from
 27 the district court's adverse determination; thus, Runningeagle took the risk that, in the
 28 event of an intervening change in the law, he would not benefit from such change."
 (Ninth Circuit Docket, 59.) Judge Bea also stated that Petitioner "appears very unlikely to
 succeed" on the remanded claims. (*Id.*)

1 reasonableness and that the deficiency prejudiced the defense. *Id.* at 687–88.

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3 The inquiry under *Strickland* is highly deferential, and “every effort [must] be
4 made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of
5 counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at
6 the time.” *Id.* at 689; see *Wong v. Belmontes*, 558 U.S. 15 (2009) (per curiam); *Bobby v.*
7 *Van Hook*, 558 U.S. 4 (2009) (per curiam); *Cox. v. Ayers*, 613 F.3d 883, 893 (9th Cir.
8 2010). To satisfy *Strickland*’s first prong, a defendant must overcome “the presumption
9 that, under the circumstances, the challenged action might be considered sound trial
10 strategy.” *Id.* “The test has nothing to do with what the best lawyers would have done.
11 Nor is the test even what most good lawyers would have done. We ask only whether
12 some reasonable lawyer at the trial could have acted, in the circumstances, as defense
13 counsel acted at trial.” *Id.* at 687–88.

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17 With respect to *Strickland*’s second prong, a petitioner must affirmatively prove
18 prejudice by “show[ing] that there is a reasonable probability that, but for counsel’s
19 unprofessional errors, the result of the proceeding would have been different. A
20 reasonable probability is a probability sufficient to undermine confidence in the
21 outcome.” *Id.* at 694.

22
23 **B. *Martinez v. Ryan***

24
25 Federal review is generally not available for a state prisoner’s claims when those
26 claims have been denied pursuant to an independent and adequate state procedural rule.
27 *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In such situations, “federal habeas
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1 review of the claims is barred unless the prisoner can demonstrate cause for the default
2 and actual prejudice as a result of the alleged violation of federal law.” *Id. Coleman* also
3 held that ineffective assistance of counsel in post-conviction proceedings does not
4 establish cause for the procedural default of a claim. *Id.*

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6 In *Martinez*, the Court established a “narrow exception” to the rule announced in
7 *Coleman*. The Court explained that,

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9 Where, under state law, claims of ineffective assistance of trial counsel
10 must be raised in an initial-review collateral proceeding, a procedural
11 default will not bar a federal habeas court from hearing a substantial claim
12 of ineffective assistance at trial if, in the initial-review collateral
13 proceeding, there was no counsel or counsel in that proceeding was
ineffective.

14 132 S. Ct. at 1320; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (noting that
15 *Martinez* may apply to a procedurally defaulted trial-phase ineffective assistance of
16 counsel claim if “the claim . . . was a ‘substantial’ claim [and] the ‘cause’ consisted of
17 there being ‘no counsel’ or only ‘ineffective’ counsel during the state collateral review
18 proceeding” (quoting *Martinez*, 132 S. Ct. at 1320)).

19
20 Subsequently, in *Trevino*, the Supreme Court extended *Martinez* to apply where a
21 state’s procedural rules do not forbid a defendant from raising an ineffective assistance of
22 counsel claim on direct appeal, but make it “highly unlikely that a defendant will have a
23 meaningful opportunity” to raise such a claim. 133 S. Ct. at 1921.

24 II. ANALYSIS

25
26 Petitioner argues that Antieau’s ineffective performance during the first PCR
27 proceedings excuses Petitioner’s default of Claims 1-C, 1-H, and 17. Respondents offer
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1 several counter-arguments. First, they contend that *Martinez* does not apply because
2 “then-existing Arizona law did not bar Runningeagle from raising [ineffective assistance]
3 claims as part of the appeal, and he in fact presented such issues to the Arizona Supreme
4 Court.” (Doc. 156 at 9.) Next, Respondents argue that *Martinez* is inapplicable because
5 both the PCR ineffectiveness allegation and the allegations of trial counsel
6 ineffectiveness in Claims 1-C and 1-H were summarily rejected on the merits in state
7 court. (*Id.* at 9–10.) Respondents also argue that Antieau’s performance on direct appeal
8 and during the first PCR proceedings was not ineffective under *Strickland*. (*Id.* at 11–12.)
9 Finally, Respondents contend that Petitioner’s underlying claims of ineffective assistance
10 of trial counsel are not substantial under *Martinez*. (*Id.* at 13.) The Court addresses these
11 arguments as follows.

12 **A. *Martinez* does not apply**

13 As the Supreme Court noted, at the time the petitioner in *Martinez* filed his direct
14 appeal, in 2002, Arizona did not permit a defendant to allege ineffective assistance of
15 trial counsel on direct appeal. Previously, however, Arizona law permitted appellants to
16 raise ineffectiveness claims on direct appeal, develop those claims by staying the appeal
17 pending an evidentiary hearing in the trial court, and then consolidate review of the post-
18 conviction hearing with the direct appeal.

19 In *State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982), the appellant
20 raised an ineffectiveness claim on appeal and the Arizona Supreme Court remanded to
21 the lower court for a hearing on the issue. The court remarked that “when the issue of
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1 competency of trial counsel has been raised, we have always resolved the matter with
2 whatever was before us in the record and without giving trial counsel an opportunity to
3 be heard. However, we believe that in some cases where this issue is raised, it would be
4 appropriate to remand the case for a hearing on the question.” *Id.*; *see also Lambright v.*
5 *Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001) (observing that at the time of Lambright’s
6 default of an ineffective assistance claim in the mid-1980s, Arizona law permitted claim
7 of ineffective assistance to be raised on direct appeal).

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10 In 1989, two years before Petitioner filed his opening brief on direct appeal, the
11 Arizona Supreme Court reiterated its preference for staying an appeal pending
12 development of ineffectiveness claims in a post-conviction hearing before the trial court:

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15 Generally, this court is reluctant to decide claims of ineffective
16 assistance in advance of an evidentiary hearing to determine the reasons for
17 counsel’s actions or inactions on any particular point. . . .

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19 As a general matter, we recommend that when a defendant wishes to
20 raise the question of ineffective assistance during the pendency of his
21 appeal, he should file the proper petition under Rule 32, Ariz. R.Crim. P.,
22 17 A.R.S., in the trial court and seek an order from the appellate court
23 suspending the appeal. The trial court should then hold an evidentiary
24 hearing and make its ruling. Afterward, a defendant should seek to
25 consolidate the post-conviction proceedings with the direct appeal.

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27 *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989); *see State v. Carver*, 160 Ariz.
28 167, 175, 771 P.2d 1382, 1390 (1989).

It was not until 1995, four years *after* Petitioner filed his appeal, that the Arizona
Supreme Court abandoned its preference for suspending appeals pending evidentiary

1 development of ineffectiveness claims in a post-conviction proceeding. As the court
2 explained in *Krone v. Hatham*, 181 Ariz. 364, 890 P.2d 1149 (1995):
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4 We once routinely stayed appeals pending resolution of Rule 32
5 proceedings, but that practice proved unworkable and resulted in long
6 delays. *See, e.g., State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994)
7 (five years from conviction to disposition on appeal). Now, we will almost
8 never allow a Rule 32 proceeding to delay a direct appeal.

9 We are aware that our present practice may appear to conflict with
10 the practice suggested by cases starting with *State v. Valdez*. . . . However,
11 the practice of staying appeals pending resolution of Rule 32 proceedings
12 has proven unsuccessful, and we will no longer engage in it, barring the
13 most exceptional circumstances.

14 *Id.*, 890 P.2d at 1151. The practical effect of *Krone* was the elimination of direct
15 appellate review of ineffectiveness claims developed in a postconviction proceeding.

16 Finally, in *State v. Spreitz*, 202 Ariz. 139, 3 P.3d 525, 527 (2002), the Arizona
17 Supreme Court expressly ruled that ineffectiveness claims raised on direct appeal would
18 not be entertained and must be presented solely in a post-conviction petition following
19 appeal. The court held that “ineffective assistance of counsel claims are to be brought in
20 Rule 32 [PCR] proceedings.” *Id.*; *see Lambright*, 241 F.3d at 1203 (finding preclusion
21 under Arizona’s Rule 32 inadequate to bar ineffectiveness claim because at the time of
22 the alleged procedural default Arizona law permitted but did not require that
23 ineffectiveness claims be raised on appeal).

24 Accordingly, at the time of Petitioner’s appeal, Arizona did not bar him from
25 raising ineffectiveness claims on appeal and in fact provided for direct appellate review
26 of such claims. *See Martinez*, 132 S. Ct. at 1320 (emphasizing that the Court’s holding is
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1 limited to situations “where the State barred the defendant from raising the claims on
2 direct appeal”). Pursuant to the process endorsed in *Valdez*, Petitioner raised ineffective
3 assistance claims in a post-conviction proceeding and then consolidated those claims with
4 the other issues raised on appeal.
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7 As previously noted, in *Trevino*, 133 S. Ct. at 1921, the Supreme Court extended
8 its holding in *Martinez* to cases in which a “state procedural framework, by reason of its
9 design and operation, makes it highly unlikely in a typical case that a defendant will have
10 a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on
11 direct appeal. . . .” Petitioner argues that under *Trevino* the principle announced in
12 *Martinez* applies to Petitioner’s defaulted ineffective assistance claims. (Doc. 159 at 6–7.)
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14
15 In *Trevino*, the Court noted two features of Texas’ procedures that necessitated
16 application of *Martinez*, despite the fact that the state did not expressly require defendants
17 to raise ineffective assistance claims in collateral proceedings rather than on direct
18 appeal. First, “Texas procedure makes it ‘virtually impossible for appellate counsel to
19 adequately present an ineffective assistance [of trial counsel] claim’ on direct review.”
20 133 S. Ct. 1918 (citation omitted). The Court noted that by their very nature ineffective
21 assistance of counsel claims require information outside of the trial court record. *Id.*
22 Although a convicted defendant may seek to develop additional evidence by moving for a
23 new trial, Texas procedural rules impose timelines making the process unrealistic. *Id.*
24 Next, the Court explained that, “were *Martinez* not to apply, the Texas procedural system
25 would create significant unfairness. That is because Texas courts in effect have directed
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1 defendants to raise claims of ineffective assistance of trial counsel on collateral, rather
2 than on direct, review.” *Id.* at 1319.

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4 These concerns were not present in the Arizona procedure in place at the time of
5 Petitioner’s appeal. First, because the direct appeal was stayed pending resolution of the
6 PCR proceedings, the time constraints noted in *Trevino* were not present.

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8 Second, in Petitioner’s case, Arizona law accommodated precisely the procedures
9 Petitioner used to raise his ineffective assistance of counsel claims. Arizona courts, unlike
10 the Texas courts described in *Trevino*, did not “strongly discourage” defendants from
11 raising such claims on direct appeal, *Trevino*, 133 S. Ct. at 1320, but instead
12 recommended that “that when a defendant wishes to raise the question of ineffective
13 assistance during the pendency of his appeal, he should file the proper petition under
14 Rule 32 . . . in the trial court and seek an order from the appellate court suspending the
15 appeal.” *Valdez*, 770 P.2d at 319. After the trial court rules on the Rule 32 petition, the
16 “defendant should seek to consolidate the post-conviction proceedings with the direct
17 appeal.” *Id.*

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19 Thus, at the time of Petitioner’s appeal, Arizona courts were not directing
20 defendants away from the procedure he followed in raising his ineffective assistance
21 claims. Numerous other capital appellants followed the recommended *Valdez* course, and
22 the Arizona Supreme Court routinely consolidated review of the post-conviction hearing
23 with the direct appeal, thus providing direct appellate review of ineffectiveness claims.
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25 See, e.g., *State v. Vickers*, 180 Ariz. 521, 525–57, 885 P.2d 1086, 1090–92 (1994)

1 (reversing conviction based on claim of ineffective assistance of counsel developed in
2 post-conviction evidentiary hearing); *State v. Henry*, 176 Ariz. 569, 685–86, 863 P.2d
3 861, 877–78 (1993) (affirming ineffectiveness claims denied following state post-
4 conviction evidentiary hearing); *State v. Salazar*, 173 Ariz. 399, 414–15, 844 P.2d 566,
5 581–82 (1992) (same); *State v. Amaya–Ruiz*, 166 Ariz. 152, 179–92, 800 P.2d 1260,
6 1287–90 (1990) (same); *State v. Rockwell*, 161 Ariz. 5, 12–13, 775 P.2d 1069, 1076–77
7 (1989) (reviewing ineffective assistance at trial); *State v. McCall*, 160 Ariz. 119, 127, 770
8 P.2d 1165, 1173 (1989) (reviewing alleged ineffectiveness of counsel at resentencing).

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12 Again, Petitioner followed this procedure and raised ineffective assistance of
13 counsel claims in a Rule 32 petition, which was later consolidated with his direct appeal.
14 As described in more detail below, Antieau sought to develop new evidence, retaining a
15 mental health expert and an investigator. The trial court and the Arizona Supreme Court
16 reviewed the ineffective assistance claims raised by Antieau.
17

18 A number of federal circuit and districts court have considered the applicability of
19 *Martinez* and *Trevino* to a state’s procedures for raising ineffective assistance of counsel
20 claims. In *Nash v. Hepp*, 740 F.3d 1075, 1079 (7th Cir. 2014), the Seventh Circuit noted
21 that “Wisconsin law expressly allows—indeed, in most cases requires—defendants to
22 raise claims of ineffective assistance of trial counsel as part of a consolidated and
23 counseled *direct* appeal, and provides an opportunity to develop an expanded record.” In
24 Illinois, district courts have found *Martinez* and *Trevino* inapplicable because “Illinois
25 allows ineffective assistance claims to be raised on direct appeal.” *O’Quinn v. Atchison*,
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1 No. 12-cv-746-DRH-CJP, 2014 WL 1365455, at *5 (S.D.Ill. April 7, 2014); *see Murphy*
2 *v. Atchison*, No-C-3106, 2013 WL 4495652, *22 (N.D.Ill. August 19, 2013) (“In Illinois,
3 collateral proceedings are not the first opportunity to raise an ineffective assistance of
4 counsel claim.”). In *Williams v. Rock*, No. 09-CV3576(JS), 2014 WL 3882331, at *3
5 (E.D.N.Y. August 6, 2014), a court in the Eastern District of New York found *Martinez*
6 and *Trevino* inapplicable because “Petitioner could have raised his ineffective assistance
7 of counsel on direct appeal.”
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10 Other courts have found *Martinez* and *Trevino* applicable given a state’s
11 procedural rules. *See, e.g., Sutton v. Carpenter*, 745 F.3d 787, 792–94 (6th Cir. 2014);
12 *Harms v. Cline*, --- F.Supp.2d ----, 2014 WL 2694200, at *11 (D.Kan. June 13, 2014);
13 *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508, at *8 (W.D.Wash. April 28,
14 2014); *Brown v. Thomas*, No. 2:11–CV–3578–RDP, 2013 WL 5934648, at *2 (N.D.Ala.
15 Nov. 5, 2013); *Raglin v. Mitchell*, No. 1:00cv767, 2013 WL 5468227, at *7 (S.D.Ohio
16 Sept. 29, 2013). In these cases, the court noted that the state procedures implicated the
17 same concerns that formed the basis of the Supreme Court’s ruling in *Trevino*. In *Sutton*,
18 for example, the Sixth Circuit explained that “Tennessee’s procedural rules make it
19 almost impossible for a defendant in a typical case to adequately present an ineffective-
20 assistance claim on direct appeal,” and that Tennessee courts have directed defendants to
21 raise ineffective assistance claims on collateral review. 745 F.3d at 792–93. In *Harms*,
22 the court explained that *Trevino* applied because Kansas courts had held that collateral
23 review rather than direct appeal was the appropriate means for raising ineffective
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1 assistance of counsel claims. 2014 WL 2694200, at *11. The court further explained that
2 “the same practical considerations which led to the *Trevino* holding, such as the need for
3 a new lawyer, the need to expand the trial court record, and the need for sufficient time to
4 develop the claim, argue strongly for initial consideration of Petitioner’s claim during
5 collateral, rather than on direct, review.” *Id.*

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8 Again, neither the procedures in place at the time of Petitioner’s appeal, nor the
9 practical considerations discussed in *Trevino*, support the applicability of *Martinez* and
10 *Trevino* to Petitioner’s case. Pursuant to then-applicable Arizona procedures, Petitioner
11 was appointed new counsel for his appeals and PCR proceedings. Then the appeal was
12 stayed while he pursued post-conviction relief, including ineffective assistance claims.
13 He was not, in sum, barred from raising the defaulted ineffective assistance of counsel
14 claims, nor was it highly unlikely that the claims would be heard.

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17 **B. Application of *Martinez* does not entitle Petitioner to relief**

18 Next, the Court finds that even if *Martinez* did apply to Petitioner’s case, it does
19 not provide cause to excuse the procedural default of these claims. PCR counsel’s
20 performance was neither deficient nor prejudicial under *Strickland*.

21 Under *Martinez* a petitioner may establish cause for the procedural default of an
22 ineffective assistance claim by demonstrating two things: (1) ‘counsel in the initial-
23 review collateral proceeding, where the claim should have been raised, was ineffective
24 under the standards of *Strickland* . . .’ and (2) ‘the underlying ineffective-assistance-of-
25 trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate
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1 that the claim has some merit.” *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012)
 2 (quoting *Martinez*, 132 S. Ct. at 1318); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th
 3 Cir. 2014); *Dickens v. Ryan*, 740 F.3d 1302, 1319–20 (9th Cir. 2014) (en banc); *Detrich*
 4 *v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc); *Sexton v. Cozner*, 679 F.3d 1150, 1157
 5 (9th Cir. 2012).
 6
 7

8 In a series of recent cases the Ninth Circuit has provided guidelines for applying
 9 *Martinez*. The most recent case, *Clabourne*, summarized the court’s *Martinez* analysis as
 10 follows:
 11

12 To demonstrate cause and prejudice sufficient to excuse the
 13 procedural default, therefore, *Martinez* and *Detrich* require that *Clabourne*
 14 make two showings. First, to establish “cause,” he must establish that his
 15 counsel in the state postconviction proceeding was ineffective under the
 16 standards of *Strickland*. *Strickland*, in turn, requires him to establish that
 17 both (a) post-conviction counsel’s performance was deficient, and (b) there
 18 was a reasonable probability that, absent the deficient performance, the
 19 result of the post-conviction proceedings would have been different.
 20 Second, to establish “prejudice,” he must establish that his “underlying
 21 ineffective-assistance-of-trial-counsel claim is a substantial one, which is to
 22 say that the prisoner must demonstrate that the claim has some merit.”

23 *Clabourne*, 745 F.3d at 377 (citations omitted).⁶

24 1. Claims 1-C and 1-H

25 ⁶ In *Detrich*, a plurality of the en banc panel held that “a prisoner need show only
 26 that his PCR counsel performed in a deficient manner” and “need not show actual
 27 prejudice resulting from his PCR counsel’s deficient performance, over and above his
 28 required showing that the trial-counsel IAC claim be ‘substantial’ under the first *Martinez*
 requirement.” 740 F.3d at 1245 (W. Fletcher, J., plurality). However, as the court noted in
Clabourne, a majority of the *Detrich* panel rejected that view and concluded instead that
 to demonstrate cause “the petitioner must show that his post-conviction relief counsel
 was ineffective under *Strickland*. . . .” *Clabourne*, 745 F.3d at 376; *see Sexton*, 679 F.3d
 at 1157.

1 In Claim 1-C, Petitioner alleges that trial counsel rendered ineffective assistance
2 by failing to request the appointment of second counsel to assist him in trying Petitioner's
3 case. (Doc. 149 at 15–16.) In Claim 1-H, Petitioner alleges that counsel performed
4 ineffectively by failing to develop a theory of defense implicating co-defendant Tilden as
5 the actual killer (*Id.* at 17–24.)
6

7
8 Antieau did not raise these claims on appeal or in the first PCR proceedings.
9 Petitioner raised the claims in his third PCR proceeding. (Doc. 21, Ex. X.) As this Court
10 noted in its interim order on the procedural status of Petitioner's claims (Doc. 90 at 13),
11 the state court ruled that the claims were precluded as waived under Ariz.R.Crim.P.
12 32(a)(3). (Doc. 21, Ex. Y at 1.) Alternatively, the PCR court dismissed the claims
13 summarily on the merits pursuant to Rule 32.6(c). (*Id.*)
14
15

16 Respondents argue that the state court's summary denial was a decision on the
17 merits under *Harrington v. Richter*, 131 S. Ct. 770 (2011), thereby triggering the “double
18 deference” standard for review of ineffective assistance of counsel claims under the
19 AEDPA.⁷ (Doc. 156 at 16–17.) Petitioner contends that the court never reached the merits
20 and therefore this Court must review the claims *de novo*. (Doc. 159 at 9–12.) The Court
21 need not resolve this issue, because under any standard of review the claims are not
22 substantial and Antieau did not perform at a constitutionally ineffective level by failing to
23 raise them.
24
25

26
27 ⁷ In *Harrington v. Richter*, the Supreme Court held that a claim is “adjudicated on
28 the merits” for purposes of 28 U.S.C. § 2254(d) of the Antiterrorism and Effective Death
Penalty Act even where the state court issued only a summary denial. 131 S. Ct. at 784–
85.

1 a. Claim 1-C
2

3 Petitioner was represented at trial and sentencing by attorney Balthazar Iniguez. In
4 arguing that Iniguez performed ineffectively at Petitioner's 1988 trial, Petitioner contends
5 that the prevailing standard of care was set forth in the 1989 ABA Guidelines, which
6 stated that "[i]n cases where the death penalty is sought, two qualified attorneys should
7 be assigned to represent the defendant." (Doc. 149 at 15, quoting 1989 ABA Guideline
8 2.1.) Therefore, according to Petitioner, Iniguez performed deficiently by failing to
9 request the appointment of second counsel.
10

11 Failure to seek the appointment of second counsel can give rise to habeas relief
12 only if this Court first determines that the absence of co-counsel prejudiced the defense.
13 *Cf. Allen v. Woodford*, 395 F.3d at 998 (explaining there can be no deficient performance
14 unless the record shows that counsel was unable to try the case alone); *Riley v. Taylor*,
15 277 F.3d 261, 306 (3d Cir. 2001) ("The Constitution does not specify the number of
16 lawyers who must be appointed. If a single attorney provides reasonably effective
17 assistance, the Constitution is satisfied, and if a whole team of lawyers fails to provide
18 such assistance, the Constitution is violated."); *see also Ortiz v. Stewart*, 149 F.3d 923,
19 933 (9th Cir. 1998) (explaining that "[i]t is well established that an ineffective assistance
20 claim cannot be based solely on counsel's inexperience").
21
22
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25 Petitioner contends that he was prejudiced by the cumulative effect of Iniguez's
26 errors, "which may well have been prevented by the appointment of second counsel."
27 (Doc. 149 at 16.) As specific examples of Iniguez's ineffective performance, Petitioner
28

1 cites the allegations in Claims 1-H and 17. (*Id.*) Because Claim 1-C does not state a claim
2 independent of Petitioner's other ineffective assistance claims, which the Court will
3 address next, it is not substantial and its procedural default is not excused under *Martinez*.
4

5 **b. Claim 1-H**
6

7 Petitioner alleges that trial counsel rendered ineffective assistance by failing to
8 develop a defense theory implicating co-defendant Tilden as the killer. (Doc. 149 at 17–
9 24.)
10

11 At the joint trial, Tilden offered an alibi defense, while Petitioner's defense was
12 that there was insufficient evidence to find him guilty beyond a reasonable doubt.
13 *Runnigeagle*, 176 Ariz. at 68–69, 859 P.2d at 178–79. On direct appeal, the Arizona
14 Supreme Court found that the two strategies were not mutually exclusive. *Id.* at 68, 859
15 P.2d at 178. The Ninth Circuit agreed with the Arizona Supreme Court's assessment that
16 the jury could have believed both Tilden's alibi argument and Petitioner's insufficiency
17 of the evidence argument. *Runnigeagle*, 686 F.3d at 777. As the court explained, "[t]hat
18 Tilden highlighted the state's paucity of evidence as to his guilt by focusing on the
19 physical evidence implicating Runnigeagle does nothing to change this fact." *Id.*
20
21

22 Trial counsel's performance was not deficient under *Strickland*. As Respondents
23 note, the evidence presented at trial pointed to Petitioner as the person who stabbed the
24 victims. The trial court in its special verdict found that "there is no evidence to indicate
25 that Defendant Tilden inflicted any of the horrendous stab wounds. All the evidence
26 points to defendant Running Eagle [sic] who owned the survival knife, whose palm print
27
28

1 was found in the laundry room above the bloody bodies.” (ROA 290 at 16–17.) The
2 Arizona Supreme Court agreed with the trial court’s finding that Petitioner “in fact killed
3 the victims.” *Runnigeagle*, 176 Ariz. at 64, 859 P.2d at 174. This Court concluded that
4 the evidence supported a finding that Petitioner committed the murders, noting that
5 “Petitioner’s knife, which he used to threaten the couple, was seized from his vehicle and
6 found to be consistent with the wounds suffered by the victims.” (Doc. 132 at 27.)
7 Finally, the Ninth Circuit characterized as “overwhelming” the “evidence that
8 Runnigeagle did the stabbing.” 686 F.3d at 770.

11
12 According to Petitioner, the courts’ view of the evidence as clearly implicating
13 Petitioner as the murderer is a product of trial counsel’s failure to shift the blame to
14 Tilden. (Doc. 159 at 16.) However, Petitioner does not explain how such a strategy would
15 have countered the palm print evidence and the evidence showing that Petitioner owned a
16 knife consistent with the knife that caused the victims’ wounds, and was seen threatening
17 the victims with a knife before they were stabbed.

19
20 Petitioner asserts that counsel could have supported the theory that Tilden was the
21 actual killer by presenting evidence of Tilden’s bad character, including his “long history
22 of emotional outbursts and violence.” (Doc. 149 at 20.) Respondents are correct,
23 however, that this evidence would likely have been inadmissible under Rule 404(a) of the
24 Arizona Rules of Evidence (“Evidence of a person’s character or a trait of character is not
25 admissible for the purpose of proving action in conformity therewith on a particular
26 occasion.”). *See, e.g., State v. Nordstrom*, 200 Ariz. 229, 243, 25 P.3d 717, 731 (2001),
27
28

1 *overruled on other grounds, State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012); *State*
2
3 *v. Bocharski*, 200 Ariz. 50, 58, 22 P.3d 43, 51 (2001).

4 **2. Claim 17**

5 Petitioner alleges that Iniguez “failed to present readily available and compelling
6 mitigation evidence.” (Doc. 149 at 27.) This information concerned Petitioner’s
7 impoverished childhood and dysfunctional home life, his family background of
8 alcoholism and mental health issues, his medical history, and his own alcoholism. (*Id.* at
9 32–50.) Petitioner also faults Iniguez for failing to retain an independent mental health
10 expert to evaluate Petitioner, with a focus on Petitioner’s cultural background as a Native
11 American. (*Id.* at 51–61.) Petitioner asserts that his default of this claim is excused by
12 PCR counsel’s ineffective performance.
13
14
15

16 In his third PCR petition, Petitioner alleged that Antieau performed ineffectively
17 on direct appeal and during the first PCR proceeding. (Doc. 21, Ex. X at 195–96.) The
18 state court found the claim precluded as waived under Ariz.R.Crim.P. 32(a)(3) (*id.*, Ex
19 Y), and this Court found the claim procedurally barred (Doc. 108 at 18).
20

21 To show that Antieau’s ineffective performance caused the default of this claim,
22 Petitioner must “establish that both (a) [Antieau’s] performance was deficient, and (b)
23 there was a reasonable probability that, absent the deficient performance, the result of the
24 post-conviction proceedings would have been different.” *Clabourne*, 745 F.3d at 377. As
25 described below, Antieau’s performance was not deficient or prejudicial under
26 *Strickland*.
27
28

1 a. Sentencing proceedings
2

3 Following Petitioner's conviction, Iniguez moved for mental health examinations
4 under Rule 26.5 of the Arizona Rules of Criminal Procedure, which provides for court-
5 ordered evaluations prior to sentencing. Psychologists Michael Bayless and Francis Enos
6 evaluated Petitioner and prepared reports which were submitted to the court, along with
7 an evaluation completed by another psychologist, Dr. Roger Martig, in 1982, in
8 connection with a juvenile sexual assault proceeding.
9

10 Dr. Martig's report concluded that Petitioner has "a significant amount of
11 repressed anger," and diagnosed him as having "conduct disorder, undersocialized,
12 aggressive." (ROA 257 at 9.) In discussing Petitioner's background, Dr. Martig noted that
13 there was abuse between Petitioners' parents. (*Id.* at 2.)
14
15

16 Dr. Bayless diagnosed Petitioner with antisocial personality disorder, "a
17 characterological disorder and one that is extremely difficult to treat. (Doc. 149, Ex. 2.)
18 He opined that Petitioner "is dangerous to the community" and recommended that he be
19 placed in a "secure, structured environment." (*Id.* at 5.)
20

21 Dr. Enos concluded that Petitioner "does not suffer from any of the usual
22 psychiatric diagnostic patterns involving any of the major emotional disorders such as
23 manic/depressive psychosis or schizophrenia. He does not appear to be suffering from
24 any of the neurotic mechanisms or anxiety reactions. His primary problem appears to be
25 sociopathic. . . ." (ROA 258 at 10.) Dr. Enos elaborated that Petitioner "gets a pleasure
26 out of 'twisting the tail of the authority' and doing what he wants, when he wants, and
27
28

1 where he wants it. In fact, he gets a certain amount of excitement—which may be a
2 secondary sexual satisfaction—out of terrorizing people and getting by with it.” (*Id.*)
3

4 Drs. Martig, Bayless and Enos all measured Petitioner’s intelligence as in the
5 superior range.
6

7 Iniguez filed a sentencing memorandum advancing several mitigating
8 circumstances. (ROA 229.) He argued that there was no direct evidence that Petitioner
9 committed the murders; that Petitioner was intoxicated on “jungle juice” and beer when
10 the crimes were committed; that he suffered from a long-term drinking problem; that the
11 murders were not planned but impulsive acts committed while Petitioner’s “mind was
12 impaired by alcohol”; that Petitioner was raised by alcoholic parents; and that Petitioner
13 did not have a violent record and the murder was out of character. (*Id.* at 1–3.) Iniguez
14 argued in support of three statutory mitigating circumstances: that Petitioner’s
15 intoxication diminished his capacity to appreciate the wrongfulness of his conduct or
16 conform his conduct to the requirements of the law; that the crime was committed under
17 unusual or substantial stress because Petitioner was struggling to adjust to a new social
18 setting in Scottsdale, Arizona, after living on a reservation in South Dakota; and
19 Petitioner’s age of 18. (*Id.* at 5–7.) Iniguez also challenged the three aggravating
20 circumstances alleged by the state. (*Id.* at 3–5.)
21
22
23
24

25 Prior to sentencing, the probation department prepared, and the trial court
26 reviewed, two pre-sentence reports. The first report was authored by Deputy Adult
27 Probation Officer Cathy Hontz. (ROA 232.) The “social history” section of the report
28

1 was based on information provided by Petitioner and taken from his juvenile court file.
2
3 (*Id.* at 7.) The report stated that Petitioner’s mother and stepfather were alcoholics, but
4 apart from their drinking Petitioner “experienced no significant difficulties during his
5 youth.” (*Id.*) The report detailed Petitioner’s educational and employment background.
6
7 (*Id.* at 7–8.) In a section on “substance use,” the report noted that Petitioner first
8 experimented with alcohol at age 11, began drinking regularly at 16, and “experienced a
9 number of personal difficulties due to drinking.” (*Id.* at 8.) The “health” section of the
10 report noted Petitioner’s asthma, a broken collarbone he suffered at age 8, an incident
11 where Petitioner was knocked unconscious during an altercation in 1981, and an incident
12 at age 12 when Petitioner almost died as a result of improperly treated double pneumonia.
13
14 (*Id.* at 9.) The mental health section referenced Dr. Martig’s 1982 psychological
15 evaluation.
16

17 A second pre-sentence report was prepared by Probation Officer Debbie Vaughn.
18 (ROA 254.) Vaughan spoke with Petitioner’s juvenile probation officer, who supervised
19 Petitioner when he was around 12 years old. (*Id.* at 7.) According to the officer, “there
20 was a great deal of dysfunction in the family” and she was tempted to contact child
21 protective services. (*Id.*) There was little stability or structure in the home, and Petitioner
22 “basically ‘raised himself.’” (*Id.* at 5.) Petitioner’s “family had very little furniture and
23 household provisions and on many occasions there was no food in the house.” (*Id.*) The
24 probation officer described Petitioner’s family as difficult to work with, stating “they
25 would continually relocate in efforts to evade the probation department.” (*Id.*) There was
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1 little warmth or closeness among Petitioner's family members. (*Id.*) Alcohol abuse
2 appeared to be a factor in the family's dysfunction. (*Id.* at 5.)
3

4 The court also received 15 letters submitted on Petitioner's behalf. These included
5 letters from his mother and from employers, school counselors, and family friends. (*See*
6 ROA 261–69.) These letters all portrayed Petitioner in a positive light. Petitioner's
7 mother described his many good qualities, including his kindness, gentle character,
8 generosity, love for his family, and intelligence. Petitioner's mother also described his
9 serious asthma condition. (ROA 261.) The letter did not raise additional red flags about
10 the family's home life. (*Id.*) The family was happy, according to Petitioner's mother,
11 even in the absence of a lot of material goods. (*Id.*) Petitioner himself wrote two letters
12 to the court. (ROA 260, 273.)
13
14
15

16 At the aggravation/mitigation hearing, Iniguez presented several witnesses to
17 testify on Petitioner's behalf, including Petitioner's mother and stepfather, as well as
18 other family members and friends. (RT 12/9/98.) The testimony focused on Petitioner's
19 family background, including the fact that his parents struggled with alcohol, that
20 Petitioner did not know his biological father, and that the family moved frequently during
21 Petitioner's childhood. Petitioner's witnesses all testified that Petitioner was a kind, non-
22 violent, and hard-working person whose participation in the crime was shocking and out
23 of character, and likely the product of intoxication. (*Id.* at 5–106.)
24
25

26 Petitioner also testified and asked for a life sentence. (*Id.* at 82.) He insisted that he
27 and Tilden did not commit the murders and complained of misconduct on the part of the
28

1 jury, witnesses, and prosecutor. (*Id.* at 83–91.) He explained he could not show remorse,
2 being innocent of the crimes, but stated that said he felt “bad for the people for losing
3 them and for the people that died themselves.” (*Id.* at 83–84.)

4
5 Subsequently, during oral argument on the aggravating and mitigating
6 circumstances, Iniguez urged the court to consider as mitigating circumstances
7 Petitioner’s youth and background as a Native American trying to adjust to white society.
8 (RT 1/13/89 at 57–58.) Iniguez argued that at the time of the crimes Petitioner was
9 intoxicated on beer and “jungle juice,” a potent concoction made with a grain alcohol
10 called Everclear. (*Id.* at 62; *see id.* at 75.) He also argued that as a Native American
11 Petitioner was particularly vulnerable to the effects of alcohol. (*Id.* at 63.) He
12 characterized Petitioner as respectful and caring when sober, with no violent propensities.
13 (*Id.* at 73.)

14
15 Iniguez disputed aspects of Petitioner’s anti-social personality diagnosis but noted
16 that with treatment and the passage of time Petitioner would cease to pose a danger. (*Id.*
17 at 57, 65–67.) He argued that a personality disorder combined with alcohol consumption
18 diminished Petitioner’s capacity to conform his conduct to the requirements of the law.
19 (*Id.* at 67.)

20
21 Iniguez also challenged the aggravating factors advanced by the state, and
22 characterized the killings as impulsive rather than premeditated and out of character for
23 Petitioner, who was not a violent person and was living a normal and productive life
24 before the crimes. (*Id.* at 67–69.) Finally, in arguing for a life sentence, Iniguez described
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1 Petitioner as an intelligent, polite, and courteous person loved by his family. (*Id.* at 71.)

2
3 Iniguez repeated these arguments at the sentencing hearing. (RT 2/3/89 at 9–13.)

4 The trial court in its special verdict indicated that it had considered Petitioner’s
5 letters and those written on his behalf; the psychological reports by Drs. Martig, Bayless,
6 and Enos; and the pre-sentence reports (ROA 290 at 1–2.) The court found three
7 aggravating factors: that Petitioner committed the murder for pecuniary gain; that the
8 murders were committed in an especially cruel, heinous, or depraved manner; and that
9 each murder was committed during the commission of the other murder. (*Id.* at 4–8.)

10
11
12 With respect to mitigation, the court found that Petitioner’s alcohol consumption
13 prior to the murders “certainly did not rise to the level of a defense nor was it even
14 sufficient to indicate that it affected [Petitioner’s] physical or mental abilities” and did
15 not affect his “capacity to appreciate the wrongfulness of his conduct nor his ability to
16 conform his conduct to the requirements of the law.” (*Id.* at 8–9.)

17
18 The court found that Petitioner’s age was a mitigating factor, but not sufficient to
19 call for leniency. (*Id.* at 10.)

20
21 The court also found that the psychological reports did not contain mitigating
22 information. Dr. Martig’s report indicated that Petitioner suffered from emotional
23 problems requiring treatment but did not diagnose Petitioner with “any one significant
24 impairment.” (*Id.* at 9.) The court then noted that the reports prepared by Drs. Bayless
25 and Enos reached “amazingly similar” conclusions, finding that Petitioner has superior
26 intelligence, is in contact with reality, and “is not suffering from any type of mental
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1 disorder or disease that would either serve as a defense nor in any way impair his
2 capacity to appreciate the wrongfulness of his conduct or conform his conduct to the
3 rights [sic] of the law.” (*Id.*) The reports also indicated that Petitioner “does not have the
4 types of feelings or emotions that people usually have for family or friends. His concern
5 is for himself and his own appetites.” (*Id.* at 9–10.) The court stated, however, that it did
6 not use this information as aggravating circumstances. (*Id.* at 9.)

7
8 The court sentenced Petitioner to death but imposed a life sentence on co-
9 defendant Tilden. The court found that Tilden’s “character, family background, and
10 psychological prognosis” called for mitigation. (*Id.* at 16.) The court noted that Tilden
11 grew up with no father figure and experienced frequent abandonment by his mother. (*Id.*
12 at 15–16.) In contrast to Petitioner, Tilden was able to feel remorse. (*Id.* at 16.) Although
13 he was diagnosed by a defense expert as suffering from narcissistic personality disorder,
14 in the court’s view Tilden, unlike Petitioner, was capable of rehabilitation. (*Id.*)

15
16 The court also distinguished Tilden’s “degree of participation” in the crimes,
17 characterizing Petitioner as the initiator of the events that led to the murders and “the
18 intelligent, charismatic leader that [his] younger cousin Tilden followed.” (*Id.* at 16, 17.)
19 The court also noted that the evidence showed it was Petitioner who stabbed the victims.
20 (*Id.* at 17.)

21
22 **b. PCR proceedings**

23
24 In his supplemental PCR petition, Antieau raised 11 claims, including the claims
25 that trial counsel performed ineffectively by failing to move to sever Petitioner’s trial and
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1 performed ineffectively during closing argument. (ROA 339.) In the first of these
2 ineffective assistance claims, Antieau argued that as a result of counsel's failure to move
3 to sever, Petitioner was "confronted with two prosecutors," the second one being co-
4 defendant Tilden's counsel. (*Id.* at 3.) According to Antieau, "[t]hat posture continued
5 through sentencing, when Tilden presented, and the Court adopted, some distinction
6 between 'narcissistic personality disorder' and 'antisocial personality disorder' sufficient
7 to warrant leniency for Tilden but not for Petitioner." (*Id.*)

8
9
10 Antieau also alleged that the trial court "misconstrued" Petitioner's mental health
11 mitigation evidence. (*Id.* at 21–22.) Specifically, Antieau argued that the court erred by
12 using Petitioner's lack of remorse as a basis for finding that Petitioner suffered from anti-
13 social personality disorder. The PCR court denied the claims.

14
15
16 On direct appeal, Antieau raised 10 claims, including the ineffective assistance
17 claims, claims challenging the aggravating factors, and a claim that substantial mitigation
18 evidence called for leniency. (Doc. 21, Ex. A.) The Arizona Supreme Court found the
19 claims without merit.

20
21 During the PCR proceedings, on June 25, 1990, Antieau requested the
22 appointment of an investigator and a mental health expert. (ROA 323.) Antieau argued
23 that he needed expert assistance to dispute the finding that Petitioner had an anti-social
24 personality disorder. (ROA 325.) The court granted the motion on July 19, 1990. (ME
25 7/19/90.) On August 10, 1990, Antieau moved for Dr. Otto Bendheim, a psychiatrist, to
26 be appointed as Petitioner's mental health expert. (ROA 328.) The court granted the
27
28

1 motion on October 31, 1990. (ME 10/31/90.) The court also granted Antieau's motion to
2 extend the deadline for filing a supplemental PCR petition to November 15, 1990. (*Id.*)
3 On November 13, 1990, Antieau again moved to extend the filing deadline, arguing that
4 Dr. Bendheim needed additional time to complete his examination of Petitioner. (ROA
5 337.)
6

7
8 Antieau filed the second supplemental petition on November 15, 1990. (ROA
9 339.) Along with the petition he filed a request for additional funds for Dr. Bendheim.
10 (ROA 338.) Antieau stated that Dr. Bendheim, "having reviewed the mental health
11 reports, the testimony, and the Court's findings . . . will testify that . . . there are very
12 weak scientific grounds for the distinction between narcissistic personality disorder and
13 anti-social personality disorder" and "an alternative diagnosis of mixed personality
14 disorder appears appropriate, at least as to Petitioner, and should have at least been
15 considered at the time of the original examinations." (*Id.*) In his reply brief, Antieau
16 reiterated that Dr. Bendheim questioned Tilden's diagnosis of narcissistic personality
17 disorder and Petitioner's diagnosis of antisocial personality disorder, but that an
18 examination of Petitioner was still necessary. (ROA 348 at 3.) Antieau asked the court to
19 "either reconsider its sentencing decision without any reference to this elusive and ill-
20 founded psychological 'distinction' or . . . provide Petitioner with the resources necessary
21 to demonstrate to the Court that the distinction, at least in this case, is unsound." (*Id.*)
22 Antieau attached to the filing a letter from Dr. Bendheim. (ROA 348, attachment.) In the
23 letter Dr. Bendheim acknowledged that Antieau had asked him to explain the distinction
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1 between narcissistic personality disorder and sociopathic personality disorder. (*Id.*) Dr.
2 Bendheim listed the materials he had reviewed but stated that, in order to reach a more
3 precise diagnosis of Petitioner, he would need to perform an examination.⁸ (*Id.*)

4
5 The court denied the motion for additional funding, explaining that it was not
6 “persuaded that further funds should be expended for purposes of securing a third defense
7 report.” (Doc. 21, Ex. F at 3–4; ME 4/19/91.) The court found the request “not
8 appropriate in the context of post-conviction relief proceedings.” (*Id.* at 4.) The court also
9 noted that Petitioner’s diagnosis of anti-social personality disorder was not the only basis
10 for imposing a death sentence. (*Id.* at 4.) Finally, the court explained that Petitioner “had
11 the benefit of two mental health experts and more than sufficient time to present this
12 evidence at the 703 [aggravation/mitigation] hearing.” (*Id.*)

13
14 Antieau filed a motion for rehearing. (Doc. 21, Ex. G; ROA 352.) He argued that
15 the court had misconstrued the mitigation evidence by basing its sentencing decision on
16 Petitioner’s lack of remorse and the “pseudo-scientific distinction between ‘anti-social
17 personality disorder and ‘narcissistic personality disorder.’” (*Id.* at 2.) Antieau then
18 asserted that Petitioner was entitled to an evidentiary hearing because his “ineffective
19 assistance of counsel claims are not raisable on appeal.” (*Id.*)

20
21 The court denied the motion for rehearing. (*Id.*, Ex. H; ROA 355.) The court
22 reiterated that it did not improperly use Petitioner’s “lack of empathy or feelings” in its
23

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26
27 ⁸ According to the invoice submitted by Dr. Bendheim, he performed a total of 3
28 and a half hours of work on the case, which included record review and telephone
conferences with Antieau and Dr. Bayless. (*Id.* at 352, attachment.)

1 sentencing decision. (*Id.*)

2
3 As noted above, the record shows that during the first round of PCR proceedings
4 Antieau also moved for the appointment of an investigator. (ROA 323.) The court
5 granted the motion, and appointed Mary Durand. (ME 8/13/90.) In his motion to extend
6 the filing deadline, Antieau stated that Durand “has not yet completed her work.” (ROA
7 334.) In a declaration dated February 1, 2013, however, Durand states that she does not
8 recall whether she actually performed any investigatory work for Antieau. (Doc. 149-9.)

9
10 In his third round of PCR proceedings, Petitioner did raise a claim of ineffective
11 assistance of counsel at sentencing, specifically alleging that Iniguez failed to investigate
12 and present mitigating evidence and failed to obtain an independent mental health expert.
13 (Doc 21, Ex. X at 96-115, 128–37.) As discussed in more detail below, in support of this
14 claim Petitioner filed a number of exhibits, including Petitioner’s medical and education
15 records (ROA 417, Ex’s. A, E); affidavits from Tilden’s trial lawyers, Roland Steinle and
16 Brent Graham, who offered criticisms of Iniguez’s performance, including his failure to
17 secure an independent mental health examination of Petitioner (Doc. 126, Ex’s. I, J); a
18 declaration from Petitioner’s aunt, Marlene Tilden (Doc. 127, Ex. P); and a declaration
19 from psychologist Dr. Katherine DiFrancesca, who elaborated on Petitioner’s difficult
20 family background and substance abuse issues (*id.*, Ex. Q). The state court found this
21 claim precluded and did not address the merits. (Doc. 21, Ex. Y at 1.)

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26 c. Application of *Martinez*

1 To excuse the procedural default of Claim 17, Petitioner must show that Antieau's
2 performance was ineffective under *Strickland*. To accomplish that, Petitioner must
3 establish that Antieau's performance was deficient and there was a reasonable probability
4 that, absent the deficient performance, the result of the post-conviction proceedings
5 would have been different. *Clabourne*, 745 F.3d at 377.
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8 i. PCR counsel's performance was not deficient

9 Criminal defendants are entitled to representation that does not fall "below an
10 objective standard of reasonableness" in light of "prevailing professional norms."
11 *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14
12 (1970)). "That standard is necessarily a general one," *Bobby v. Van Hook*, 558 U.S. 4,
13 7 (2009), because "[n]o particular set of detailed rules for counsel's conduct can
14 satisfactorily take account of the variety of circumstances faced by defense counsel or the
15 range of legitimate decisions regarding how best to represent a criminal defendant,"
16 *Strickland*, 466 U.S. at 688–89.
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19 As noted above, the inquiry under *Strickland* is highly deferential and "every
20 effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the
21 circumstances of counsel's challenged conduct, and to evaluate the conduct from
22 counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Under *Strickland*, "[t]he
23 question is whether an attorney's representation amounted to incompetence under
24 'prevailing professional norms,' not whether it deviated from best practices or most
25 common custom." *Harrington*, 131 S. Ct. at 788. There is a "strong presumption" that
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1 counsel's attention to certain issues to the exclusion of others reflects trial tactics rather
2 than "sheer neglect." *Id.* at 790 (quoting *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per
3 curiam)).

4
5 In assessing Antieau's post-conviction performance, the Court is guided by the
6 analogous law applying *Strickland* to direct appeal counsel. To be entitled to relief on a
7 claim of ineffective assistance of appellate counsel, a petitioner "must show that
8 counsel's performance was objectively unreasonable, which in the appellate context
9 requires the petitioner to demonstrate that counsel acted unreasonably in failing to
10 discover and brief a merit-worthy issue." *Moormann v. Ryan*, 628 F.3d 1101, 1106 (9th
11 Cir. 2010) (citing *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). The petitioner must also
12 show prejudice, "which in this context means that the petitioner must demonstrate a
13 reasonable probability that, but for appellate counsel's failure to raise the issue, the
14 petitioner would have prevailed in his appeal." *Id.*; see also *Clabourne*, 745 F.3d at 377
15 (explaining that prejudice from PCR counsel's performance requires showing "a
16 reasonable probability that, absent the deficient performance, the result of the post-
17 conviction proceedings would have been different"); *Sexton*, 679 F.3d at 1157.

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19 The Supreme Court has emphasized that "effective legal assistance" does not
20 mean that appellate counsel must appeal every question of law or every nonfrivolous
21 issue requested by a criminal defendant. *Jones v. Barnes*, 463 U.S. 745, 751–54 (1983)
22 ("Experienced advocates since time beyond memory have emphasized the importance of
23 winnowing out weaker arguments on appeal and focusing on one central issue if possible,
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1 or at most on a few key issues.”); *see Sexton*, 679 F.3d at 1157 (“Counsel is not
2 necessarily ineffective for failing to raise even a nonfrivolous claim.”). In *Smith v.*
3 *Robbins*, the Court explained that “[n]otwithstanding *Barnes*, it is still possible to bring a
4 *Strickland* claim based on counsel’s failure to raise a particular claim, but it is difficult to
5 demonstrate that counsel was incompetent.” 528 U.S. at 288. Given appellate counsel’s
6 wide discretion in exercising professional judgment, the presumption of effective
7 assistance of counsel can ordinarily be overcome “only when ignored issues are clearly
8 stronger than those presented. . . .” *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th
9 Cir. 1985)); *see also Murray v. Carrier*, 477 U.S. 478, 486–87 (1986) (“[T]he mere fact
10 that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the
11 claim despite recognizing it, does not constitute cause for procedural default.”).

12 The Court finds that Antieau’s performance was not objectively unreasonable. As
13 discussed above, on appeal and during the PCR proceedings, Antieau raised a claim that
14 trial counsel was ineffective for failing to move to sever Petitioner’s trial, which led,
15 among other outcomes, to the presentation of contrasting mental health diagnoses at
16 sentencing. Antieau also challenged Petitioner’s death sentence on several grounds.
17 While he did not raise a claim directly challenging Iniguez’s failure to secure an
18 independent mental health expert, he did argue, based on Dr. Bendheim’s input, that anti-
19 social personality disorder was not a proper diagnosis and should not have been a basis
20 for the court’s sentencing decision.

21 In *Clabourne*, by contrast, there was “no dispute” that post-conviction counsel’s
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1 performance was deficient. As the Ninth Circuit noted:

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3 Clabourne's post-conviction counsel, who had no experience with Arizona
4 post-conviction proceedings, filed several postconviction petitions in state
5 court that failed to comply with Arizona's procedural rules. After
6 admonishing the lawyer to comply with the rules and assert valid claims,
7 the Arizona post-conviction court denied all claims with prejudice for his
8 failure to comply. On appeal from that denial by the trial level court, post-
conviction counsel abandoned almost all claims, including the two
Strickland claims arising from Clabourne's resentencing. *Strickland*'s first
prong, as applied to Clabourne's post-conviction counsel, is satisfied.

9 745 F.3d at 378.

10 In sum, taking into account that *Strickland*'s standard for evaluating counsel's
11 performance is highly deferential, the Court finds that Petitioner has not overcome the
12 "strong presumption" that Antieau's performance was within the "wide range of
13 reasonable professional assistance." *Strickland*, 466 U.S. at 689; *see Harrington*, 131 S.
14 Ct. at 790. The issues raised by Antieau, which included a challenge to the sentencing
15 court's handling of the mental health evidence, were not clearly weaker than a claim of
16 ineffective assistance of trial counsel.

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19 ii. PCR counsel's performance was not prejudicial

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21 Even if Antieau's performance was deficient, the cause element under *Martinez* is
22 not satisfied because Petitioner cannot show that he was prejudiced by Antieau's
23 performance. *Clabourne*, 745 F.3d at 377–78. There is not a reasonable probability that
24 the result of the PCR proceedings would have been different if Antieau had raised claims
25 alleging ineffective assistance of counsel at sentencing. *Id.*

1 The trial judge presided over the first round of PCR proceedings. In her order
2
3 denying the PCR petition, she addressed Antieau's argument that the court had
4 misconstrued the mental health evidence at sentencing by finding that Petitioner suffered
5 from anti-social personality disorder and was incapable of remorse. (ME 4/19/91 at 4.)
6
7 The court indicated that her decision to sentence Petitioner to death did not depend on his
8 diagnosis, explaining that "it appears that it is Petitioner who has taken one aspect of the
9 Court's sentencing as if it were the only basis for the Court's determination of the
10 appropriate and lawful sentence." (*Id.*; see ROA 355.) Under these circumstances, it is
11 clear that Petitioner was not prejudiced by Antieau's failure to raise a claim that trial
12 counsel performed ineffectively with respect to evidence of Petitioner's mental condition.
13 Because the sentencing decision did not depend on Petitioner's mental health diagnosis,
14 raising such a claim could not have affected the court's PCR ruling.
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16
17 Petitioner contends that trial counsel performed ineffectively by failing to further
18 investigate and present mitigating evidence of Petitioner's impoverished and
19 dysfunctional family background, his medical history, and his struggles with alcohol
20 abuse. Petitioner argues in turn that Antieau performed ineffectively as PCR counsel by
21 failing to raise a claim attacking trial counsel's performance. Again, Petitioner was not
22 prejudiced by this aspect of Antieau's performance. First, as described above, the court at
23 sentencing had before it extensive information concerning Petitioner's background. One
24 of the pre-sentence reports noted that "there was a great deal of dysfunction in the
25 family" and that Petitioner's "family had very little furniture and household provisions
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1 and on many occasions there was no food in the house.” (ROA 254 at 7.) Another pre-
2 sentence report outlined Petitioner’s medical history, listing various injuries and illnesses.
3 (ROA 232 at 9.) It also stated that Petitioner’s mother and stepfather had drinking
4 problems (*id.* at 7), an argument Iniguez raised in his sentencing memorandum (ROA 229
5 at 2.)
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8 Both reports stated that Petitioner began drinking alcohol at a young age and had
9 experienced adverse consequences as a result. (*See* ROA 232 at 7–8.) At sentencing,
10 Iniguez argued that Petitioner was intoxicated on “jungle juice” at the time of the
11 murders. (RT 1/13/89 at 62, 75.)
12

13 Petitioner raised the allegations in Claim 17 in his third PCR petition. (Doc. 21,
14 Ex. X.) Her supported the claim with additional evidence about his background and
15 psychological condition, as well as trial counsel’s performance at sentencing.
16

17 In her August 1996 affidavit, Dr. DiFrancesca painted a grimmer picture of the
18 poverty and dysfunction of Petitioner’s childhood home. (Doc. 127-4, Ex. Q.) She stated
19 that Petitioner’s mother and stepfather were both alcoholics and that Petitioner witnessed
20 frequent violent quarrels between the couple. (*Id.* at 2.) Dr. DiFrancesca also offered a
21 revised version of Petitioner’s substance abuse history. She reported that Petitioner began
22 drinking hard liquor at age eight and experienced alcoholic blackouts as an adolescent.
23 (*Id.* at 3.) She also indicated that Petitioner “huffed” paint thinner and other substances
24 and smoked marijuana and hashish. (*Id.*) Dr. DiFrancesca opined that Petitioner does not
25 have anti-social personality disorder but, in contrast to the findings made by the trial
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1 court, is capable of experiencing remorse and learning from his mistakes. (*Id.*) Instead,
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3 Petitioner “suffers from psychological and mental disorders resulting from his alcoholism
4 and other substance abuse, his history of physical and emotional neglect, and his medical
5 history.” (*Id.*)

6
7 Dr. DiFrancesca also suggested that it was Petitioner’s Native American heritage,
8 rather than a personality disorder, that prevented him from reacting emotionally or
9 showing remorse at his trial. (*Id.* at 5.) She stated that Petitioner was “caught up in the
10 styles of his opposing worlds, Native American culture and white-dominated culture.”
11 (*Id.* at 5–6.) Dr. DiFrancesca also opined that Petitioner may suffer from neurological
12 deficits as a result of his substance abuse and unspecified head trauma. (*Id.* at 4.) She
13 recommended neurological testing. (*Id.*)

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16 Petitioner also submitted an affidavit from his aunt, Marlene Tilden. (Doc. 127-3,
17 Ex. P.) She stated that Petitioner had no contact with his biological father, who was
18 white, and that he was raised primarily by his grandmother. (*Id.* at 1.) Ms. Tilden also
19 indicated that Petitioner and his mother moved frequently, living in Phoenix, New
20 Mexico, Washington, Colorado, Oklahoma, and South Dakota. (*Id.* at 2.) Petitioner
21 frequently missed school due to his severe asthma. (*Id.*)

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24 Ms. Tilden stated that alcoholism was rampant in Petitioner’s family. (*Id.* at 2.)
25 Petitioner’s mother and stepfather were married in 1976, when Petitioner was eight. (*Id.*)
26 His stepfather was also an alcoholic, and there was a great deal of physical violence in
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1 the household. (*Id.* at 2–3.) The family lived in poverty. (*Id.* at 3.) Petitioner lived on a
2 reservation for the first time when he was 14. (*Id.*)

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4 Petitioner submitted affidavits from counsel for co-defendant Tilden. Mr. Steinle,
5 Tilden’s lead counsel, stated that he advised Petitioner’s trial counsel not to request a
6 mental health examination under Rule 26.5 because the results of such an examination,
7 which may include information harmful to the defendant, are provided to the court. (Doc.
8 126-6, Ex. I at 3–4.) Notwithstanding this advice, Iniguez twice moved for examinations
9 under Rule 26.5 rather than seeking a private exam, the results of which did not have to
10 be disclosed to the court. (*Id.*) Tilden’s co-counsel, Brent Graham, provided a similar
11 affidavit. (Doc. 126–7, Ex. J.)

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14 The state court denied the third PCR petition. (*Id.*, Ex. Y.) It found the ineffective
15 assistance claims to be procedurally defaulted because they had not been previously
16 raised. (*Id.*) Alternatively, the court found the claims not colorable. (*Id.*)

17
18 This Court concludes that there is not a reasonable probability that the trial court
19 would have granted relief if Antieau had raised these same allegations during the first
20 round of PCR proceedings. In rejecting the PCR petition, the state court addressed
21 Antieau’s argument that Petitioner did not suffer from antisocial personality disorder. The
22 court explained that its sentencing decision was not based on that diagnosis, and denied
23 Antieau’s motion for additional funding for Dr. Bendheim. *Cf. Leavitt v. Arave*, 646 F.3d
24 605, 610 (9th Cir. 2011) (holding trial counsel did not perform ineffectively at
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1 resentencing by failing to seek a third expert opinion, where judge had previously stated
2 that defendant's mental health was not likely to be a significant factor at sentencing).
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4 Moreover, much of the evidence Petitioner cites is cumulative to the evidence that
5 was before the trial court at sentencing. This included information about Petitioner's
6 difficult background and dysfunctional family life, which was contained in the
7 presentence reports and elsewhere. Iniguez argued in mitigation that Petitioner
8 experienced difficulty negotiating between Native American and white society. He also
9 argued that Petitioner was intoxicated at the time of the crimes. Information about
10 Petitioner's past alcohol abuse was set out in the presentence reports, which also listed
11 some of Petitioner's medical history.
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14 The circumstances of this case are similar to those in *Van Hook*, 558 U.S. 4, where
15 the Supreme Court rejected a claim that defense counsel were ineffective based on an
16 insufficient mitigation. The Court noted that counsel had spoken with the defendant's
17 mother, father, and aunt, and with a family friend; met with two expert witnesses;
18 reviewed military and medical records; and considered enlisting a mitigation specialist.
19 *Id.* at 18. Counsel also presented evidence that the petitioner began drinking and using
20 drugs as a child, witnessed his father abuse his mother, had violent fantasies, attempted
21 suicide five times, suffered from borderline personality disorder, consumed drugs and
22 alcohol on the day of the crime, and may have been motivated by a "homosexual panic."
23 *Id.* at 18–19. The Court found that the scope of counsel's investigation was reasonable
24 even though counsel did not interview all of the defendant's relatives or the therapists
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1 who treated his parents.⁹ *Id.* at 19.

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3 Similarly, in *Cox v. Ayers*, the petitioner argued that counsel performed
4 ineffectively at sentencing because he “did not obtain all public records regarding his
5 family; did not interview additional family members, counselors, friends, or teachers; and
6 decided not to present retained experts as witnesses.” 613 F.3d 883, 892.

7
8 During the penalty phase of his trial, Cox’s counsel focused on four arguments. *Id.*
9 at 893. “First and foremost,” counsel argued that Cox was not the actual shooter. *Id.*
10 Counsel further argued in mitigation that a sentence of life imprisonment is worse than a
11 death sentence, that Cox was a valuable human being who had a traumatic childhood, and
12 that Cox had been influenced or manipulated by his gang. *Id.*

13
14 Counsel called seven witnesses to testify on Cox’s behalf during the penalty
15 phase. *Id.* Four of the witnesses were close relatives, including Cox’s great grandmother,
16 grandmother, sister, and brother. *Id.* They testified that Cox, who rarely saw his father
17 and whose mother was an abusive alcoholic, was raised by his great grandmother, who
18 enrolled him in Boy Scouts and gave him an allowance and a bike. *Id.* The witnesses all
19 testified that they wanted to see Cox live. *Id.*

20
21 Counsel also called a school administrator and a teacher who knew Cox during his
22 adolescence. *Id.* at 893–94. They testified that Cox exhibited good behavior until he until
23 he became involved in one of the gangs that were prevalent in the neighborhood. *Id.*

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27 ⁹ Van Hook had also criticized “counsel’s failure to obtain an independent mental-
28 health expert and their reliance on (and failure to object to harmful evidence in) a
presentence investigation report.” 558 U.S. at 18, n.2. He ultimately “concede[d],
however, that neither ground is a ‘basis for issuing the writ’ . . .” *Id.*

1 Finally, counsel presented testimony from a former nurse at San Quentin, who described
2 the harsh conditions Cox would face as a prisoner serving a life sentence there. *Id.* at 894.

3
4 The Ninth Circuit found that counsel's performance was not deficient. The court
5 explained that "[c]ounsel reasonably decided not to present, and not to look further for,
6 evidence concerning Petitioner's character and emotional state." *Id.* at 897. The court
7 noted that the decision not to present such evidence "reflected counsel's strategic choice
8 to emphasize their primary argument at the penalty phase: that [Cox] was not the
9 shooter." *Id.* Moreover, counsel reasonably believed that additional evidence about Cox's
10 troubled background "would only have raised inferences that his abusive childhood
11 turned him into a hardened criminal who was quite capable of murdering four people."
12 *Id.* Therefore, presenting "further evidence about [Cox's] childhood and gang activity
13 would have suggested violent propensities at odds with counsel's goal of portraying
14 [Cox] as less culpable." *Id.*

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18 Many of these circumstances were also present in Iniguez's representation of
19 Petitioner at sentencing. Iniguez used the testimony of close relatives to argue that
20 Petitioner was a good person who was loved by his family. He argued that Petitioner did
21 not have a violent record and the murders were out of character, the result of his
22 intoxication on beer and "jungle juice." He argued that Petitioner was courteous and
23 intelligent and would not pose a danger in the future, notwithstanding his diagnosis of
24 antisocial personality disorder. He argued that at the time of the crimes Petitioner was
25 experiencing difficulty adjusting to life in white society. Moreover, evidence of
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1 Petitioner's family and social background was before the court in the presentence report,
2 and additional evidence of his positive qualities was set forth in letters from family and
3 acquaintances.
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5 Furthermore, the "more complete picture portrayed of [Petitioner's] dysfunctional
6 family life does not depict a life history of [Petitioner] himself that is nightmarish as it
7 was for the petitioners in cases . . . where newly produced evidence in mitigation has
8 carried the day." *Rhoades v. Henry*, 638 F.3d 1027, 1051 (9th Cir. 2011). These cases,
9 which include *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510
10 (2003); and *Williams v. Taylor*, 529 U.S. 362 (2000), are readily distinguished from
11 Petitioner's case by both the availability and the quality of the mitigating evidence that
12 counsel failed to present at sentencing.
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16 In *Rompilla*, the evidence counsel failed to uncover and present—despite the fact
17 that the prosecutors had provided defense counsel with the file containing the
18 information—showed that during Rompilla's childhood he was beaten by his father with
19 fists, straps, belts, and sticks; that his father locked him and his brother in a dog pen filled
20 with excrement; and that he grew up in a home with no indoor plumbing and was not
21 given proper clothing by his parents. 545 U.S. at 391–92. In *Wiggins*, trial counsel failed
22 to present evidence that Wiggins suffered continuous abuse during the first six years of
23 his life, was the victim of "physical torment, sexual molestation, and repeated rape during
24 his subsequent years in foster care," was homeless for portions of his life, and was
25 deemed to have diminished mental capacities. 539 U.S. at 535. In *Williams*, sentencing
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1 counsel “failed to conduct an investigation that would have uncovered extensive records
2 graphically describing Williams’s nightmarish childhood, not because of any strategic
3 calculation but because they incorrectly thought that state law barred access to such
4 records.” 529 U.S. at 395. The new evidence showed that Williams had been severely and
5 repeatedly beaten by his father, had been committed to the custody of the social services
6 bureau, had no schooling beyond sixth grade, and was borderline mentally retarded. *Id.* at
7 370–71.

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11 Petitioner’s newly proffered evidence gives additional details to the broad outlines
12 contained in the presentence reports, psychological evaluations, testimony, and letters
13 considered by the court at sentencing. It depicts a home life in which the alcoholism of
14 Petitioner’s mother, stepfather, and extended family led to neglect, poverty, and a lack of
15 stability. However, the new evidence does not indicate that Petitioner himself was
16 subjected to physical or sexual abuse. *See Rhoades*, 638 F.3d at 1052 (“While it is not
17 necessary for abuse to have been aimed at Rhoades in order to be mitigating, that there is
18 no evidence it was makes his case less compelling in light of the strength of the
19 aggravating circumstances than the *Rompilla*, *Wiggins*, and *Williams* line of cases.”).

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22 Based on these circumstances, there is not a reasonable probability that the trial
23 court would have granted relief if Antieau has raised an ineffective assistance claim
24 during the PCR proceedings. The claim would have been based on Iniguez’s failure to
25 present largely cumulative evidence or evidence the trial court itself indicated was not
26 essential to its sentencing decision.
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1 The Ninth Circuit’s analysis in *Leavitt*, 646 F.3d 605, further illustrates the
2 weaknesses of the claim alleging that Petitioner was prejudiced by Antieau’s failure to
3 challenge Iniguez’s performance at sentencing. In *Leavitt*, the petitioner argued that
4 counsel at resentencing performed ineffectively by failing to further investigate the
5 petitioner’s mental health and failing to request an MRI. During that proceeding three
6 mental health experts had diagnosed Leavitt with an antisocial personality disorder. *Id.* A
7 CT scan was also performed, with results suggesting a “possibility” of disease. *Id.* The
8 trial court nevertheless denied the Leavitt’s motion for an MRI, explaining that “any
9 further evidence of the mental condition of the defendant . . . will not be a significant
10 factor in the resentencing.” *Id.* at 607, 611.

14 The Ninth Circuit found that counsel’s performance was neither deficient nor
15 prejudicial. First, the court found that counsel’s “decision to forego further investigation
16 into Leavitt’s mental health condition was reasonable” based on what had occurred
17 during the initial sentencing. *Id.* at 609. The court explained that the evidence suggesting
18 possible cognitive impairment was equivocal, in that it was also consistent with the anti-
19 social personality disorder. *Id.* at 609–10. The court also noted that counsel reasonably
20 believed that a renewed motion for an MRI test would again be denied. *Id.* at 610–11.
21 Finally, the court explained that counsel acted reasonably in “switching gears” away from
22 mental-health based mitigation strategy, which had failed at the original sentencing, and
23 toward an approach emphasizing that the petitioner was a “pretty good guy” who did not
24 deserve a death sentence. *Id.* at 612. Evidence that Leavitt suffered from brain damage
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1 which led to his violent behavior would have run counter to that approach. *Id.*

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3 The Ninth Circuit also found that Leavitt was not prejudiced by resentencing
4 counsel's performance. As noted, there was not a reasonable probability the trial court
5 would have granted a motion for MRI testing if counsel had filed one. *Id.* at 613. In fact,
6 the court considered and rejected a request for additional psychological testing made by
7 Leavitt himself. *Id.* at 613–14. The court further noted that when an MRI was finally
8 taken, during federal habeas proceedings, the results were “tentative” and “highly
9 speculative.” *Id.* at 614. Finally, the court again emphasized that evidence of brain injury,
10 to the extent it was given any weight, could have been treated as aggravating rather than
11 mitigating, by showing that the petitioner was “simply beyond rehabilitation.” *Id.* at 614–
12 15 (citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1396–97 (2011)).

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16 A challenge to Iniguez's performance at sentencing, had Antieau raised such a
17 claim, would have featured the same weaknesses as the ineffective assistance claim
18 rejected in *Leavitt*. Antieau enlisted an expert to dispute Petitioner's anti-social
19 personality disorder diagnosis. However, like the trial court in *Leavitt*, the judge in
20 Petitioner's case indicated that mental health evidence was not essential to her sentencing
21 decision; accordingly, the court denied additional funding and rejected Antieau's
22 argument that in sentencing Petitioner to death she had misconstrued evidence about his
23 mental health. There is not a reasonable probability that a claim alleging that Iniguez
24 performed ineffectively at sentencing by failing to secure an additional mental health
25 expert would have resulted in a different ruling.

1 In addition, there is not a reasonable probability of a different PCR result if
2 Antieau had challenged Iniguez's failure to include more details about Petitioner's
3 childhood, social background, education, and medical history. A challenge to this aspect
4 to Iniguez's performance suffers from key drawbacks. Iniguez presented mitigation
5 evidence from Petitioner's mother and stepfather, among other witnesses. This evidence
6 focused on Petitioner's good qualities. As described above, along with the mental health
7 and presentence reports, the testimony from Petitioner's parents also outlined his
8 educational and medical history. To the extent that additional, negative information about
9 Petitioner's upbringing was not cumulative to evidence that was presented, such evidence
10 would have cast doubt on the positive information Iniguez offered through the testimony
11 of Petitioner's parents.¹⁰ *See Van Hook*, 558 U.S. at 11 (rejecting argument that counsel
12 performed ineffectively by failing to interview family members "who could have helped
13 counsel narrate the true story of Van Hook's childhood experiences" and explaining that
14 "there comes a point at which evidence from more distant relatives can reasonably be
15 expected to be only cumulative. . .").

16 In *Leavitt* the court identified another weakness in the petitioner's ineffective
17 assistance claim; namely, the nature of the mental health evidence counsel failed to
18 present. 646 F.3d at 614. This fault characterizes Petitioner's ineffective assistance claim

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¹⁰ Additional information about Petitioner's family background is contained in declarations attached to Petitioner's motion. (Doc. 149-9, Ex's. 12-21.) The declarations contain information portraying Petitioner in a positive light, as a good-hearted child growing up amid the chaos caused by the alcoholism prevalent in his extended family which involved incidents of domestic violence between Petitioner's mother and stepfather, inadequate supervision, and exposure to drugs and alcohol.

1 as well. Like the petitioner in *Leavitt*, Petitioner underwent additional mental health
2 examinations during the federal habeas proceedings, thereby obtaining diagnoses that
3 were not considered by the state court. Petitioner's new diagnoses, like those in *Leavitt*,
4 are tentative and speculative.
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6
7 Dr. Charles Heller, a psychologist with expertise in Native American mental
8 health and cultural issues, evaluated Petitioner in 2006. (Doc. 149-9, Ex. 10.) He
9 concluded that Petitioner "presented with a group of symptoms and indications strongly
10 suggestive of PTSD" (Post-Traumatic Stress Disorder) but did "not meet the full criteria
11 for PTSD." (*Id.* at 35.) Instead, he diagnosed Petitioner with "an anxiety disorder not
12 otherwise specified with PTSD features." (*Id.* at 35.) Elsewhere in his report, however,
13 Dr. Heller seems to conclude that Petitioner did suffer from PTSD. (*Id.* at 37.) Whether
14 or not Dr. Heller in fact diagnosed Petitioner with PTSD, he differentiated Petitioner's
15 condition from "classical PTSD," explaining that Petitioner's condition "is due to the
16 chronic nature of extreme stress typical of life experienced by Native Americans on a
17 reservation or urban environment." (*Id.* at 34.)
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21 With respect to the murders, Dr. Heller opined that Petitioner's intoxication
22 "exposed rage that was deeply suppressed and not seen prior to the crime" and that "[t]he
23 violent nature of the crime was uncharacteristic of Sean's life." (*Id.* at 36.) Dr. Heller
24 further opined that, "[u]nfortunately due to his deep, hidden emotional blocks and
25 messages which were ingrained by his life circumstances, Sean had an uncontrollable
26 impulse to sabotage his future." (*Id.*)
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1 With respect to the burglary, Dr. Heller opined that it “was clearly a crime that
2 was perpetrated by someone who wanted to remain a teenager and avoid growing up.”
3 (*Id.* at 37.) Petitioner did not want to grow up, Dr. Heller stated, because he had been
4 exposed to the violent deaths of adults. (*Id.*) According to Dr. Heller, “[s]ymptoms of
5 PTSD and specifically his uncontrollable rage were not visible due to Sean’s
6 idiosyncratic withholding of emotion and other coping mechanisms until the pressure
7 (and anxiety) of being adult coupled with a highly intoxicating substance caused him to
8 act-out in the way he did.” (*Id.*)

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12 Dr. Heller also concluded that Petitioner had been improperly diagnosed with anti-
13 social personality disorder at the time of sentencing. (*Id.*) Finally, citing “numerous head
14 injuries suffered by Sean in his childhood and adolescence,” Dr. Heller recommended a
15 complete neuropsychological examination, including a PET scan and MRI, to determine
16 if Petitioner has brain impairment. (*Id.* at 40.)

17
18 Dr. Heller further opined that Petitioner’s apparent lack of emotions and remorse
19 was the result of his Native American cultural heritage. (*Id.* at 5–6.) According to Dr.
20 Heller, the trial court erred in reading Petitioner’s lack of visible emotion as an inability
21 to experience remorse. (*Id.*)

22
23 Dr. Pablo Stewart, a psychiatrist, interviewed Petitioner and reviewed the record,
24 including Dr. Heller’s report. In a brief letter to Petitioner’s counsel, dated January 22,
25 2013, Dr. Stewart reported the results of his “initial psychiatric evaluation.” (Doc. 149-9,
26 Ex. 8.) Dr. Stewart opined to a reasonable degree of medical certainty that Petitioner
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1 currently suffers from PTSD and suffered from the condition at the time of the offenses.
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3 (*Id.*) He also opined that it is “very likely” that at the time of the offenses Petitioner
4 suffered from Autistic Spectrum Disorder, Major Depressive Disorder, and Substance-
5 Related Disorder. (*Id.*) Dr. Stewart recommended a full set of neuropsychological tests
6 and indicated that, depending on the results of those tests, he may also recommend an
7 MRI or PET scan of Petitioner’s brain. (*Id.*) The letter does not contain any analysis or
8 discussion of the bases for Dr. Stewart’s findings. (*Id.*) Petitioner does not proffer any
9 evidence that further tests were performed.
10
11

12 The Ninth Circuit, confronted with similarly equivocal diagnoses in *Leavitt*,
13 explained that “[s]uch opinions, which couch results in tentative language, are simply not
14 enough to show prejudice.” 646 F.3d at 614. Similarly, in *Rhoades*, the court found no
15 prejudice where the petitioner proffered new expert reports during federal habeas
16 proceedings. 638 F.3d at 1050. One of the experts “opined only that alcoholism and
17 suicides in Rhoades’s family ‘very likely’ play a genetic role in his mental health; that he
18 ‘was genetically loaded for substance abuse’; and that his chronic use of
19 methamphetamine ‘may well’ have damaged his brain.” *Id.*
20
21

22 The other expert in *Rhoades* was Dr. Stewart, who prepared a “working
23 assessment” of the petitioner. *Id.* at 1048. The court found Dr. Stewart’s conclusions
24 “similarly indeterminate.” *Id.* at 1050. For example, Dr. Stewart opined that Rhoades’s
25 family history placed him “at substantial risk” of developing mental health problems and
26 that he “may” have been born with mental deficiencies. *Id.* The court then explained that
27
28

1 “[t]he mitigating value of Stewart’s most concrete assessment, that Rhoades ‘does suffer’
2 from Post-traumatic Stress Disorder (PTSD), is lessened because his diagnosis admittedly
3 does not satisfy the requirements of DSM–IV for this condition.” *Id.* (citing *Comer v.*
4 *Schriro*, 463 F.3d 934, 944 (9th Cir. 2006)).

5
6 Noting that the reports “talk in terms of conditions that Rhoades ‘likely’ has or
7 ‘may’ have,” the Ninth Circuit concluded that “[s]peculation about potential brain
8 dysfunctions or disorders “is not sufficient to establish prejudice.” *Id.* (citing *Bible v.*
9 *Ryan*, 571 F.3d 860, 871 (9th Cir. 2009)).

10
11 In Petitioner’s case, Dr. Heller’s PTSD diagnosis is equivocal, with Dr. Heller
12 acknowledging that Petitioner did not meet the “full criteria” for the condition. (Doc.
13 149-9, Ex. 10 at 35.) Dr. Heller recommended additional testing, including a PET scan
14 and MRI. (*Id.* at 40.) Dr. Stewart, in a letter reporting the results of his initial evaluation,
15 stated that he believed to a reasonable degree of medical certainty that Petitioner suffers
16 from PTSD, but that opinion is not supported by any discussion of the applicable criteria.
17 (*Id.*, Ex. 9.) Dr. Stewart also indicated that neuropsychological testing, possibly followed
18 by a PET scan or MRI, was necessary to confirm his diagnoses. (*Id.*)

19
20 Moreover, although Dr. Heller opined that Petitioner’s apparent lack of remorse
21 during the trial was a reflection of his cultural background, the record is clear that
22 Petitioner did not express remorse because he maintained he was innocent of the murders.

23
24 In sum, the new evidence of Petitioner’s mental status is tentative and speculative.
25 The failure to present such evidence at sentencing does not form the basis for a finding of

1 prejudice. *See Leavitt*, 646 F.3d at 614; *Rhoades*, 638 F.3d at 1050. Therefore, if Antieau
 2 had raised a claim of ineffective assistance of counsel at sentencing, there was not a
 3 reasonable probability that “the result of the post-conviction proceedings would have
 4 been different.” *Clabourne*, 745 F.3d at 377.
 5

6 **III. EVIDENTIARY DEVELOPMENT**

7
 8 Petitioner seeks expansion of the record and an evidentiary hearing on the
 9 *Martinez* issue and Claims 1-H and 17. (Doc. 149 at 73–84.) He seeks to expand the
 10 record with Mary Durand’s declaration (Doc. 149-9, Ex. 9), Dr. Heller’s report (*id.*, Ex.
 11 10), Dr. Stewart’s letter (*id.*, Ex. 8), a declaration from co-defendant Tilden (*id.*, Ex. 12),
 12 and declarations from other family members and acquaintances (*id.*, Ex’s. 11, 13–21.)
 13 Petitioner also seeks an evidentiary hearing to present testimony from Steinle and
 14 Graham, Tilden’s counsel; Gloria Castillo, a defense investigator appointed during
 15 Petitioner’s trial; mitigation fact witnesses, including the declarants in Exhibits 12–21;
 16 Drs. Stewart and Heller; and experts in mitigation and capital defense. (Doc. 149 at 80–
 17 82.)
 18
 19
 20

21 Respondents oppose evidentiary development, arguing that Petitioner was not
 22 diligent in state court because he could have presented this information during the third
 23 PCR proceedings.¹¹ (*See* Doc. 156 at 77.)
 24
 25

26
 27 ¹¹ For the purposes of Petitioner’s request for evidentiary development, the Court
 28 concludes that *Cullen v. Pinholster*, 131 S. Ct. 1398, does not limit the consideration of
 new evidence concerning Claims 1-C and 1-H.

1 Under 28 USC § 2254(e)(2), a petitioner is generally not entitled to evidentiary
2 development on a claim for relief where the petitioner “failed to develop the factual basis
3 of a claim in State court proceedings” due to “a lack of diligence, or some greater fault,
4 attributable to the prisoner or the prisoners counsel.” In *Dickens*, however, the Ninth
5 Circuit held that § 2254(e)(2) “does not bar a hearing before the district court to allow a
6 petitioner to show ‘cause’ under *Martinez*” because a petitioner seeking to show cause
7 based on ineffective assistance of PCR counsel is not asserting a claim for relief. 740
8 F.3d at 1321. Therefore, the court explained,

12 a petitioner, claiming that PCR counsel’s ineffective assistance constituted
13 “cause,” may present evidence to demonstrate this point. The petitioner is
14 also entitled to present evidence to demonstrate that there is “prejudice,”
15 that is that petitioner’s claim is “substantial” under *Martinez*. Therefore, a
16 district court may take evidence to the extent necessary to determine
whether the petitioner’s claim of ineffective assistance of trial counsel is
substantial under *Martinez*.

17 *Id.*

18 Accordingly, the Court will grant Petitioner’s motion to expand the record. The
19 record will be expanded to include Exhibits 8–10 and 12–21 to Petitioner’s Supplement
20 Brief. (Doc. 149-1.)

22 However, the Court will deny Petitioner’s request for an evidentiary hearing. “[A]
23 district court in a habeas proceeding need not conduct full evidentiary hearings, but may
24 instead ‘expand the record . . . with discovery and documentary evidence.’” *Williams v.*
25 *Woodford*, 306 F.3d 665, 688 (9th Cir. 2002) (quotation omitted); *see Chang v. United*
26 *States*, 250 F.3d 79, 86 (2d Cir. 2001) (“[A district court] may avoid the necessity of an
27
28

1 expensive and time consuming evidentiary hearing in every [federal habeas] case. It may
2 instead be perfectly appropriate, depending upon the nature of the allegations, for the
3 district court to proceed by requiring that the record be expanded to include letters,
4 documentary evidence, and . . . even affidavits.”).

5
6 Expansion of the record is sufficient here. With the exception of unnamed experts
7 in capital litigation and mitigation, there are declarations from all of the witnesses who
8 would testify at an evidentiary hearing. *See Phillips v. Ornoski*, 673 F.3d 1168, 1179 (9th
9 Cir. 2012) (“Because, as the district court observed, no witnesses remained to testify at
10 [the] hearing’ who had not already been deposed, avoiding the time and expense of the
11 live hearing was a legitimate reason to vacate the earlier order [granting a hearing].”).
12 The Court is familiar with the standards applicable to counsel’s performance in capital
13 litigation and the components of an adequate mitigation investigation, so testimony from
14 experts in those areas is unnecessary.

15
16 The record before the Court, which includes that the extensive records submitted
17 during the PCR proceedings and the materials with which the record has been expanded,
18 is sufficient for the Court to rule on Petitioner’s claims.

19 20 21 22 **CONCLUSION**

23 For the reasons discussed above, Petitioner’s remanded claims are not governed by
24 *Martinez/Trevino*. Even applying *Martinez*, the default of the remanded claims is not
25 excused because PCR counsel did not perform ineffectively under the deferential
26 standard of *Strickland*.
27
28

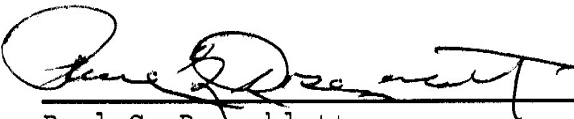
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2 Accordingly,

3 **IT IS ORDERED** the procedural default of Claims 1-D, 1-H, and 17 is not
4 excused under *Martinez*.

5 **IT IS FURTHER ORDERED** expanding the record to include Exhibits 8–10 and
6
7 12–21 to Petitioner’s Supplement Brief. (Doc. 149-1.)

8 **IT IS FURTHER ORDERED** that the Clerk of Court shall forward of copy of
9 this order to the Ninth Circuit Court of Appeals and shall terminate this matter.

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11 Dated this 2nd day of October, 2014.

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16 Paul G. Rosenblatt
17 United States District Judge
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